MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.

IBLA 81-459, 81-484 Decided May 25, 1982

Appeal from decisions of the Bureau of Land Management imposing reappraised annual rental charges for communication site rights-of-way C-11928 and C-06666.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Regulations: Applicability -- Rights-of-Way: Act of March 4, 1911.

   Where a right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976) (repealed), and was not conformed to a right-of-way under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), in accordance with sec. 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), the regulation at 43 CFR 2803.1-2(d), allowing rental adjustment without a prior hearing, is not applicable because such a pre-FLPMA right-of-way was not issued pursuant to Title V of FLPMA.

2. Administrative Procedure: Hearings -- Appraisals -- Communication Sites -- Hearings -- Rights-of-Way: Act of March 4, 1911 -- Rules of Practice: Hearings
   The requirement of 43 CFR 2802.1-7(e) (1979) for notice and opportunity for a hearing may be satisfied by a hearing at the State Office level in accordance with the basic procedural parameters set forth in Circle L, Inc., 36 IBLA 260 (1978).

APPEARANCES: John R. Stoller, Esq., Denver, Colorado, for appellant; Marla E. Mansfield, Esq., Denver, Colorado, Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

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OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Mountain States Telephone & Telegraph Company appeals from two decisions issued by district offices of the Bureau of Land Management (BLM), imposing reappraised annual rental charges for communication site rights-of-way. By a February 2, 1981, decision, the Canon City-Grand Junction Team, Branch of Adjudication, informed appellant that the annual rental charge for C-11928, a passive reflector site, had risen from $74 to $200 annually and that $370 rental was past due for the period from July 8, 1976, through July 7, 1981. By a February 20, 1981, decision, the Craig, Colorado, office informed appellant that the annual rental for C-06666, a radio site, had risen from $29.20 to $500 annually and that $58.40 was past due for the period from January 1, 1980, through December 31, 1981. The decisions cited regulations 43 CFR 2803.1-2 (45 FR 44533, July 1, 1980, effective July 31, 1980), which requires payment of fair market value for use and occupancy of public lands, and 43 CFR 2804.1(b) (45 FR 44535, July 1, 1980), which holds grantees responsible for rental while an appeal is pending. Neither decision afforded a hearing. Due to the similarity of the facts and issues presented, this Board hereby consolidates these appeals.

Appellant presents the same arguments in its two statements of reasons for appeal. Appellant asserts that the increased rentals are too high and are based on erroneous appraisals. Appellant insists that it has a right to a hearing, relying on the Act of March 4, 1911, 36 Stat. 1253, 43 U.S.C. § 961 (1976) 1/ which was in effect when the rights-of-way were granted, and on 43 CFR 2802.1-7(e) (1979), which provided:

> At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year. [Emphasis added.]

However, appellant did contest the assessment of rentals overdue at the previous rates, and the record indicates that, at least for right-of-way C-11928, the past due rental has been tendered.

In both cases, counsel for BLM responded that appellant has no vested right to any specific procedure, contending that new regulations promulgated to implement the right-of-way provisions (Title V) of FLPMA, 43 U.S.C. §§ 1761-1771 (1976), superseded the regulation appellant cited. BLM asserted that the new procedural rules in 43 CFR Part 2800 (45 FR 44518-44537 (July 1, 1980)), which were effective July 31, 1980, can be applied retroactively, citing Sun Oil Co. v. Federal Power Commission, 256 F.2d 233 (9th Cir. 1958) cert. denied, 358 U.S. 872; Pacific Molasses Co. v. F.T.C., 356 F.2d 386 (5th Cir. 1966); Summit Nursing Home, Inc. v. United States, 572 F.2d 737 (Ct. Cl. 1978).

1/ This Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, effective Oct. 21, 1976, subject to valid existing rights.

[1] This Board agrees that generally new procedural regulations may be promulgated with retroactive effect. Mountain States Telephone & Telegraph Co., 60 IBLA 221 (1981). The new regulations at 43 CFR Part 2800, however, applied to rights-of-way issued under the authority of FLPMA and those pre-existing rights-of-way which had been conformed to FLPMA, according to 43 U.S.C. § 1769(a) (1969). James W. Smith (On Reconsideration), 55 IBLA 390, 396 (1981).

These rights-of-way were issued pursuant to the Act of March 4, 1911, and were not conformed to FLPMA. Thus, 43 CFR 2803.1-2(d) is not applicable and appellant must be afforded reasonable notice and a prior hearing pursuant to 43 CFR 2802.1-7(e) (1979). See American Telephone & Telegraph Co., 61 IBLA 343 (1982).

[2] Both appellant and BLM indicated a preference for a hearing before an Administrative Law Judge. Although the Board may, at its discretion, order a hearing before an Administrative Law Judge, pursuant to 43 CFR 4.415, the requirement for a hearing found in 43 CFR 2802.1-7(e) (1979) may also be satisfied at the BLM state office level in accordance with the procedural parameters outlined in Circle L, Inc., 36 IBLA 260 (1978), and we so direct. American Telephone & Telegraph Co. (On Reconsideration), 59 IBLA 343 (1981); Mountain States Telephone & Telegraph Co., supra.

In light of our disposition of these appeals, we do not reach the questions raised by appellant of the adequacy of BLM's appraisals herein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases are remanded to BLM for further action consistent with this opinion.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Anne Poindexter Lewis
Administrative Judge